

# HEARING DECISION

## COVER SHEET

Re: V. OTTERVILLE R-VI SCHOOL DISTRICT

Student: (DOB: )

Parents:

Petitioners' Counsel:	John T. Murray Attorney at Law 717 Cherry Street Columbia, MO 65201	Kenneth M. Chackes Van Amburg, Chackes, Carlson & Spritzer 8420 Delmar Blvd, Suite 406 St. Louis, MO 63124
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Respondents' Counsel:	Teri B. Goldman Mickes, Tueth, Keeney, Cooper, Mohan & Jackstadt 425 S. Woods Mill Road, Suite 300 St. Louis, MO 63017
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Panel Members:	Dr. Gale B. Rice	Dr. Kim Ratcliffe
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Panel Chair:	J. Michael Cato P.O. Box 668 Advance, Mo. 63730
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Due Process Request Received: July 11, 2001

Due Process Hearing Held: September 5,6 & 7, 2001.

**BEFORE THE DEPARTMENT OF  
ELEMENTARY AND SECONDARY EDUCATION**

<b>IN THE MATTER OF;</b>	)	
,	)	
	)	
<b>Petitioner,</b>	)	
	)	
<b>vs.</b>	)	
	)	
<b>OTTERVILLE R-VI SCHOOL DISTRICT,</b>	)	
	)	
<b>Respondent.</b>	)	
	)	

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FINDINGS OF FACT, CONCLUSIONS OF LAW,  
DECISION AND ORDER.

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The hearing panel, after hearing the evidence in this matter makes the following findings of fact and conclusions of law and issues the following decision and order:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW:**

1. The Student, at all times relevant to this due process proceeding, resided with his parents within the boundaries of the Otterville R-VI School District (hereinafter “School District”). Student had disabilities for purposed of the Individuals with Disabilities Education Act (hereinafter “IDEA”) 20 U.S.C. § 1400 et seq.
2. The School District is a reorganized School District organized pursuant to the Revised Statutes of the State of Missouri.
3. On or about July 10, 2001, an IDEA due process proceeding was initiated on behalf of Student, alleging that the District failed to provide [student] a free appropriate public education (FAPE) “in that it failed to protect [student] from physical and sexual assault by

another student and then failed to provide an appropriate education after the assault was discovered.” In addition Petitioners alleged that the Missouri Department of Elementary and Secondary Education (DESE) “failed to provide FAPE to [student], although it was brought to the Department’s attention that Otterville R-VI School District could not or would not provide it.”

4. On or about August 10, 2001, School District filed a Motion to Dismiss and In Limine. The District asserted that Petitioners’ claims should be dismissed because it failed to state a claim cognizable under the Individuals with Disabilities Education Act (“IDEA”). *Id.* In addition, the District moved in Limine to preclude evidence at hearing regarding the alleged assault that was not available to or considered by the IEP team and for the purpose of the Panel determining whether the alleged assault actually took place.
5. On or about August 24, 2001, this Panel issued an order denying the District’s Motion to Dismiss, but granting the District’s Motion in Limine by ordering that the Petitioner was prohibited from presenting evidence regarding the alleged assault that was not available to and considered by [student’s] IEP team, absent some indication that the evidence was presented to the respondent in an effort to get a revised IEP.
6. On or about September 4, 2001, this Panel dismissed the Missouri Department of Elementary and Secondary Education as a Respondent in the case.
7. On September 5, 2001, a three-member panel empowered by the Missouri Department of Elementary and Secondary Education convened to hear evidence with respect to Petitioners’ due process request. The hearing was closed at the Petitioner’s request. Both parties were represented by legal counsel and had the opportunity to call and cross-examine witnesses.
8. The hearing panel members in this due process proceeding are as follows:

Michael Cato  
Dr. Gale B. Rice  
Dr. Kim Ratcliffe

Hearing Chairperson  
Hearing Panel Member  
Hearing Panel Member

9. Counsel for the parents: John T. Murray, Attorney at Law. 717 Cherry Street, Columbia, MO 65201 and Mr. Kenneth M. Chackes, Attorney at Law, 8420 Delmar Blvd, Suite 406, St. Louis, MO 63124.
10. Counsel for the School District: Ms. Teri B. Goldman, Attorney at Law, 425 S. Woods Mill Road, Suite 300, St. Louis, MO 63017.
11. Student is an year old male who is in the third grade of the Otterville R-VI School District in the 2001-2002 School Year.
12. Student was diagnosed with Goldenhar syndrome at birth. Student suffers from bilateral hearing loss, developmental delays, headaches and sinus problems. Student has also been diagnosed with a seizure disorder and has experienced both petit mal and grand mal seizures.
13. Although Students' parents were residing in Respondent School District, Student attended Kindergarten in the Sedalia School District during the 1997-1998 school year. Student also attended Sedalia School District for First Grade during the 1998-1999 school year. Respondent funded this placement.
14. Student was diagnosed with the educational disability of hearing impairment during the 1997-1998 and 1998-1999 school year.
15. During the spring of 1999 the Sedalia School District conducted a reevaluation of Student for purposed of IDEA. The multidisciplinary team reviewed the results of the reevaluation and changed Students IDEA diagnosis from "hearing impaired" to "Multihandicapped." As a result of this change in diagnoses, Student was no longer eligible to attend the deaf education

program with the Sedalia School District and transferred to Respondent School District for the Second Grade in the 1999-2000.

16. On or about August 23, 1999, Students' Individualized Education Program (hereinafter "IEP") team at the Otterville District decided to accept the existing Sedalia IEP for Student, but also concluded that a reevaluation needed to be conducted. The Missouri School for the Deaf conducted the reevaluation. The Missouri School for the Deaf prepared a psychological report reflecting the results of their evaluation. In that report, MSD concluded that Student, did not qualify for a special education diagnosis of mental retardation. As a result, the Otterville District changed Students diagnosis from the multihandicapped diagnosis applied by the Sedalia District to a single diagnosis of hearing impaired.
17. Kerrie Sims served as a paraprofessional for Student paraprofessional in the Sedalia District during the 1998-99 school year as well as in the Otterville District during the 1999-2000 school year.
18. On or about October 15, 1999, Students' IEP team met to prepare a new IEP for him based on the results of the reevaluation. The IEP includes goals and objectives in the following areas: reading, written language, math, speech articulation, receptive and expressive language, feeding, handwriting and fine motor. The IEP indicates that Student will receive 950 minutes per week of special education, 900 minutes per week of regular education, 60 minutes per week of occupational therapy and 40 minutes per week of speech therapy. The IEP includes assistive technology of a hearing aid and an auditory trainer.
19. Petitioners do not challenge whether the October 1999 IEP was reasonably calculated to provide educational benefit. This Panel concludes that the October 1999 IEP provides Student with a free appropriate public education in the least restrictive environment.

20. Petitioners allege that Student was sexually assault by another student during the 1999-2000 school year. This panel finds no regulation, case law or statute which would allow this panel to determine the occurrence or nonoccurrence of such an event. This panel concludes by the lack of any such mandate that it lacks jurisdiction to determine the occurrence of the event. This panel is troubled by the notion that it may reach liability for the act, or worse yet, criminal culpability by something less than the reasonable doubt standard. The panel finds its jurisdiction limited by its enabling statues and finds that the alleged assault and any resulting criminal culpability or civil liability a question for a different tribunal to ponder. Accordingly, this panel makes no findings concerning the occurrence, or nonoccurrence of the alleged assault. Further, this panel makes no determinations or finding concerning the testimony of any person concerning the occurrence or nonoccurrence of the alleged assault.
21. On, or about, May 1, 2000, Respondent prepared and sent a written notification of the IEP conference to Students' parent for the IEP meeting to be held on May 8, 2000. We note that the signature page of the IEP generated by the May 8, 2000 meeting was signed by each parent and indicated their attendance. Several witnesses testified on behalf of Respondent as to the attendance and participation at the May 8, 2000 meeting. While lacking in a great many specifics, this panel finds as credible the evidence that Students' parents did attend and participate in this meeting. This panel finds and concludes that Students parents were present for and participated in the May 8, 2000 IEP meeting.
22. Further, as to the May 8, 2000 IEP meeting, this panel finds that Students' regular education teacher may not have attended the meeting, but indicated by her testimony her agreement with the resulting IEP. Likewise the failure to invite Students mental health case manager as well as other related service personnel is not fatal. This panel finds that these procedural

irregularities have not hampered the Petitioners' ability to participate in a meaningful fashion in the formulation of the resulting IEP. Further this panel finds that the resulting IEP should not be set aside for procedural defaults.

23. This panel notes that the Students Mother testified that she was very involved with Students' education. Students mother spent some moments in Students' classroom each day as she delivered and picked up the Student.
24. In September 2000, Student had a grand mal seizure at home on a weekend. In October 2000, he had a grand mal seizure, again while he was at home. At that time, the doctor changed his medication to a form of Tegretol. Because of the likelihood of kidney stones, Student was required to increase his water intake. Student had another grand mal seizure in November 2000. After that time, he had no further grand mal seizures as of the time of hearing.
25. Petitioners allege that Student was afraid to return to school in August 2000 and was frequently absent than in the 1999-2000 school year. Likewise there were increasing numbers of headaches, petit mal seizures, and instances of toileting accidents at school. The panel notes that Student had been absent from school for nearly 1/3 of the 1999-2000 school year. An increase of an additional 10% to the already high percentage from the previous year is hardly unexpected. Likewise the panel finds as credible the testimony of the witnesses presented on behalf of the Respondent concerning the Students toileting. The panel finds that the School District personnel did not note an increase in toileting accidents during the 2000-2001 school year. Likewise, aside from the unsupported assertion of Students parents of increased headaches, this panel finds no supporting evidence.

26. Petitioners assert that Student suffered an increase in Petit mal seizure activity during the 2000-2001 school year. Respondent denies this assertion. This panel finds that it is uncontested that Student did not suffer any grand mal seizure while being supervised by Respondent personnel. As to Petit mal seizure activity, the question is much more difficult. While School District personnel report no known petit mal seizures, most would readily admit little to no formal training regarding seizure. Likewise, Parents assert that Student was being treated by a physician without disclosing medical records. Given the lack of credible evidence to support this assertion, the panel is unable to find that Student suffered an increase in seizure activity at school during this time.
27. Student returned to school after the Christmas 2000 break. Student refused to return to school on January 5, 2001 and has not attended Respondent school district since then.
28. Since January 5, 2001, Student has not attended any other public or private school nor has he received homeschool instruction. While the lack of any educational instruction for some months is clearly a cause of concern to this panel, This panel declines to make any findings as to any alleged violations of Missouri's compulsory attendance law. This panel finds no citation to any authority bringing compulsory attendance within its purview. Finding no such authority this panel finds that compulsory attendance is a question to be brought, if at all, before a different tribunal.
29. The IEP formulated for Student for the 2000-01 school year called for Student to receive 1035 minutes per week of regular education, 810 minutes per week of special education, 60 minutes per week of occupational therapy and 40 minutes per week of speech therapy. Petitioner question whether this IEP provided this Student with a free appropriate public education "in an environment where he could attend school". This panel finds that the IEP



provided personalized instruction to the Student with sufficient support services to permit him to make educational progress. There was no evidence before this panel that the Student was not or could not make educational progress with the IEP in place. Significantly the panel notes that neither party presented overwhelming evidence concerning the educational progress made by Student during the 2000-2001 school year.

30. Likewise the panel notes that while Petitioners brief and argument speak in terms of the placement of the Student the actual issue as presented to the panel was framed in terms of an “environment” where he could attend school. It appears that Petitioners argument is based upon the Students therapists assertion that Respondent had failed to provide Student with a “safe environment” in which to learn. This panel notes that the Respondent School District is charged under the IDEA to provide Student with a Free Appropriate Education in the Least Restrictive Environment. No evidence was presented which would lead this panel to believe that the placement of Student as provided in the May 8, 2000 IEP was not the least restrictive environment. This Panel finds that, based upon the evidence presented, that the IEP developed for Student provided that student with a free appropriate education in the least restrictive environment based upon the information available to the Students IEP team at that time.

31. This panel notes that during the 2000-2001 school year, Petitioners made several general requests for the Students IEP team to consider a general change of placement. At various times this request took the form of a request for placement in one of several nearby school district. At other times the request was for placement in a private school. It appears that these request were based upon changes in behavior secondary to the alleged assault occurrence and further upon the Students preference not to return to Respondent School

District. As noted above this panel declines to make any findings regarding the alleged assault. This panel notes that the evidence presented to this panel by Petitioner on this question was squarely centered on the assault issue.

32. During May 2001 Petitioners caused an application for homebound instruction to be completed and returned to Respondent School District. However the application was completed by Students' therapist. Upon receipt of the homebound application, the Respondent notified Petitioner that the therapist was ineligible to complete the application. Another being notified of this deficiency, Petitioners took no further action to ensure the completion of this application. This panel also notes that the application for homebound instruction was completed during the last week of the 2000-2001 school year. Further it appears that shortly after the rejection of the homebound application, Petitioners then demanded a change of placement to a neighboring school district. Considering the ever-changing nature of Petitioners request, and their failure to present evidence regarding specifics and the necessity of a change of placement under the IDEA, this panel can only find and conclude that the placement of the child during the 2000-2001 school year was correct.

33. On or about May 14, 2001, the District provided Petitioners with written notification of an IEP meeting scheduled for May 17, 2001. On or about May 17, 2001, Students' IEP team met. The Students parents, attorney and therapist were present and participated in the meeting. At that meeting, the Petitioners requested that Student be placed at an unspecified alternate site. Ms. Brockman, Students' therapist since May 2001, indicated to the team that she believed that Student had been assaulted and that it was not safe for him to return to the Otterville District. The District indicated that it was refusing the request and was relying on the results of the Division of Family Services investigation which concluded that the alleged

assault was not substantiated. At that meeting, Students' parents also generally requested a reevaluation but did not indicate why they wished such a reevaluation. The District requested copies of Ms. Brockman's therapy notes, but those were not provided to the team. In addition, the District asked the Student be made available for a psychological evaluation by an individual of the District's choosing, not for purposes of IDEA, but to get an independent opinion with regard to whether the assault had occurred. The Students parents merely indicated that they would consider the request. It appears that emotions ran rather high during this meeting and the IEP team was unable to review Students' IEP for the 2000-01 school year or to discuss the need for extended school year services.

34. On or about May 17, 2001, the District issued two written notices of action refused. In those notices of action, the District refused the request for an alternate placement on the grounds that the District was able to provide Student with a free appropriate public education and the Students parents had failed to provide specific information regarding an alternate placement for the team to consider such an alternate. In addition, the District refused the request for a reevaluation, without a diagnostic team meeting.
35. On, or about, June 19, 2001 Petitioners indicated that an evaluation could be conducted that "should satisfy the State" however, the evaluation could only be conducted by someone acceptable to Petitioners. Respondent found this condition unacceptable and no evaluation was conducted.
36. On or about August 3, 2001, the District provided a written notification for an IEP conference to be held on August 14, 2001. On or about August 14, 2001, Student's IEP team reconvened to conduct an annual review of his IEP and to consider the request for an alternative placement. The parents and their representatives were permitted to present their

request for an alternate placement. The team then reviewed Student's proposed IEP for the 2001-02 school year. The parents were permitted to participate in that discussion. During that discussion, Petitioners requested that the IEP include a provision by which Student could be supervised by an aide or teacher when going to the bathroom because of seizure activity. The team added that request to the IEP. Student's parent did not request any further changes to the draft IEP nor did they indicate any disagreement with the present level, goals and objectives or placement listed in the IEP. The IEP contains goals and objectives in the areas of reading, math, speech and language, independent life skills, handwriting and fine motor and sensory integration. The IEP also indicates that Student will have an auditory trainer as assistive technology. Finally, the IEP calls for Student to have special time for his academics, regular education time with a classroom aide, and speech and occupational therapy.

37. The Panel notes that no evidence was presented which would indicate that the August 14, 2001 IEP does not provide the child with a free appropriate public education. Furthermore, the evidence presented on behalf of Respondent indicates that the IEP is calculated to provide an educational benefit to Student. Based upon this evidence and the lack of evidence to the contrary, this panel finds that the August 2001 IEP provides Student with a free appropriate public education.

38. Petitioners allege that Student exhibited behavior and emotional difficulties which prevent his returning to school. Further that these difficulties trigger a requirement that the Student be reevaluated and reclassified. Barbara Brockman, a Licensed Clinical Social Worker, began treating Student in March 2001. Ms. Brockman diagnosed Student with Post Traumatic Stress Disorder with the alleged assault being the underlying event. Ms.

Brockman administered no diagnostic tests or tools, but instead utilized ‘Play therapy’. At the time of the hearing, Student was still in treatment with Ms. Brockman, but she testified that he was ready to be in a “safe” school setting. This panel notes the objections of Respondent to the use of “Play Therapy” and the conclusions drawn by Ms. Brockman from her therapy sessions with Student. The evidence presented by Respondent indicates that school district personnel did not observe a change in behavior or emotions during the 1999-2000 or 2000-2001 school years. The panel finds as credible the testimony of Respondents witnesses which indicate that Student was not necessarily fond of School, but that his behaviors were consistent throughout his time in school. This panel notes that Respondent personnel have had virtually no contact with Student since January 5, 2001.

39. This panel concludes that School District personnel must be allowed to have contact with the Student in an educational setting in order to gather up to date information. However, based upon the evidence presented, that the Student did not present any evidence of behavioral or emotional difficulties at school which would have necessitated a change in diagnoses or placement.
40. This panel concludes, based upon the evidence presented that a reevaluation is necessary for IDEA purposes. This panel also finds significant health related reasons for a reevaluation, most importantly seizure activity.
41. This panel notes that Students parents indicated during sworn testimony that they would not allow Student to return to Respondent school district until certain remedial actions had been taken. This panel finds that the remedial actions include that Respondent school district “acknowledges” the alleged assault and makes the school district “Safe” for the student. Again this panel emphasizes that it will make no findings regarding the alleged assault.

Further this panel is without jurisdiction to require Respondent to acknowledge the assaults' occurrence. This panel can only conclude that Students parents do not intend to allow Student to return to this school. Likewise this panel notes that Students IEP members have had no contact with him since January 5, 2001. This panel concludes that a method must be found to provide for the education of student while allowing access to the Student by school district personnel.

42. This panel concludes and finds that Respondent, school district, properly denied the Petitioners application for homebound services in May 2001. However, it is not clear if the Students IEP team considered homebound as an acceptable placement during the August, 2001 meeting.

#### **ISSUES AND PURPOSE OF THE HEARING:**

Parents raised the following issues by oral statement at this hearing:

1. District's failure to develop a valid IEP in May 2000 based on the failure to have all of the required participants present and the failure to give the parents notice of that -- of an IEP meeting.

2. The second issue is simply the failure of the School District to provide [student] with a free appropriate public education. Historically, that issue begins in May of 2000 with the District's failure to develop an IEP according to the proper procedures, and then it also includes the time since [student] was experiencing behavioral and emotional difficulties that were ignored by the School District. That includes the time since January 2001 when [student] stopped

attending school completely because the School District failed to offer him an appropriate education in an environment in which he could attend school.

3. The third issue is the School District's failure to determine whether [student] had another disability based on his behavior and emotional difficulties. They failed to evaluate him when confronted with all of the information that they had about an alleged sexual abuse.

### **TIMELINE INFORMATION**

The request for due process was received on July 11, 2001 with the original deadline for the holding of the hearing and mailing of the decision being August 27, 2001. On August 9, 2001 a request was received on behalf of the School District requesting an extension of the hearing timelines. The extension was granted by agreement of the parties and the timelines for both the hearing and decision were extended up to and including October 1, 2001. By agreement of the parties, this matter was set for hearing beginning September 5, 2001. Hearings were held September 5, 6 and 7, 2001.

### **PANEL MEMBERS**

Members of the due process panel were: Michael Cato, Chairperson, Dr. Gale B. Rice, Panel Member and Dr. Kim Ratcliffe, Panel Member.

### **EVIDENCE ADDUCED:**

At hearing, Petitioners' Exhibits 1 through 17 and 19 were admitted by stipulation. Petitioners' Exhibit 18 was admitted over Respondent's objection. Respondent's Exhibits 1-16,

18-19, 21-22 and 24-42 were admitted by stipulation. Respondent's Exhibits 17, 20 and 23 were admitted over Petitioners' objections.

### **DECISION AND ORDER;**

1. The School District provided the Student with a free and appropriate public education, in the Least Restrictive Environment, for the 1999-2000 School Year.
2. The IEP goals developed for the Student for the 1999-2000 School Year are not challenged by Petitioners and are found to be appropriate.
3. That the IEP formulated by the Students' IEP team in May 2000 is valid and should not be set aside because of procedural defects.
4. The IEP formulated by the Students' IEP team in August, 2001 provides the Student with a free and appropriate public education, with placement being the only issue raised by Petitioner with insufficient evidence being presented at the time of the August 2001 IEP meeting.
5. As an interim matter, Students' IEP team shall reconvene. Students placement shall be immediately changed to HOMEBOUND. The IEP formulated by the Students' IEP team in August 2001 should be adjusted as necessary for implementation in a homebound setting. This interim setting will allow school district personnel access to the Student to assess changes, if any, in the Students educational needs since January 5, 2001. Further to allow for completion of the educational reevaluation.
6. An educational reevaluation is hereby ordered. The reevaluation shall be ONLY for IDEA purposes and shall not seek to determine the occurrence or nonoccurrence of the alleged



assault. The reevaluation shall be at Respondents expense and shall be conducted by personnel acceptable to Respondent with the following qualifications:

- A “team” approach with personnel familiar with craniofacial anomalies and the education of the hearing impaired.
  - Further at least one member of the reevaluation team shall be a licensed developmental or clinical psychologist with expertise in pediatrics.
  - One member shall be appropriately qualified to conduct an assistive technology reevaluation for communication purposes.
  - The team shall obtain and consider current medical information from Students treating pediatric neurologist. The team shall consider the medical information to determine the need for the development of a health care plan and educational accommodations for the Student .
7. Upon receipt of the results of the reevaluation Respondent shall convene the Students IEP team to consider the results of said reevaluation. The Students’ IEP team shall make such changes, if any, which are appropriate in diagnoses, related services or placement as may be appropriate in light of the reevaluation.
8. No compensatory services or supports are necessary due to Students absence from Respondent School District from January through May 2001.
9. All other requests for relief are hereby denied.

#### **APPEAL PROCEDURES:**

Any party aggrieved by the decision of this panel may, pursuant to Chapter 536 of the Missouri Statutes, appeal this decision to a state court or a federal court, within 30 days of the date of the decision.

FOR THE HEARING PANEL:

All concur.

J. Michael Cato, Hearing Chairperson  
Dr. Gale B. Rice, Panel Member  
Dr. Kim Ratcliffe, Panel Member

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Dr. Gale B. Rice, Panel Member

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Dr. Kim Ratcliffe

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J. Michael Cato, Hearing Chairperson

#### CERTIFICATE OF SERVICE

the undersigned certifies that a copy of the foregoing was served upon each party to this action,  
TO-WIT;

John T. Murray	Kenneth M. Chackes
Attorney at Law	Van Amburg, Chackes, Carlson & Spritzer
717 Cherry Street	8420 Delmar Blvd, Suite 406
Columbia, MO 65201	St. Louis, MO 63124

Teri B. Goldman  
Mickes, Tueth, Keeney, Cooper, Mohan & Jackstadt  
425 S. Woods Mill Road, Suite 300  
St. Louis, MO 63017

by first class mail, return receipt requested and by depositing same in the United States Post Office in Advance,  
Missouri, with sufficient postage, on this 29th Day of September, 2001.